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No.

IN THE
SUPREME COURT OF THE UNITED STATES

GOLDIN INDUSTRIES, INC.,
GOLDIN OF ALABAMA, INC., and
GOLDIN INDUSTRIES LOUISIANA, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 18 U.S.C. § 1962(c), which creates RICO liability for "any person employed by or associated with any enterprise," can the distinctiveness requirement for corporate liability be determined solely by the corporate structure a business has decided to implement if the corporate structure is unrelated to the racketeering activity?

PARTIES TO THE PROCEEDINGS

All parties to the proceeding in the court whose judgment is sought to be reviewed are accurately reflected in the caption of the case.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioners certify that none of the three corporations which are Petitioners herein (Goldin Industries, Inc., Goldin of Alabama, Inc., and Goldin Industries Louisiana, Inc.) has a parent corporation, nor is there any publicly held company owning 10% or more of any corporation's stock. All three corporations are privately held, with ownership by members of the Goldin family.

TABLE OF CONTENTS

Page

Question Presented i

Parties to the Proceedings ii

Corporate Disclosure Statement ii

Table of Contents iii

Table of Authorities iv

Opinions Below 1

Statement of Jurisdiction 1

Statutory Provision Involved 1

Statement of the Case 2

A. Procedural History 2

B. Statement of the Facts 3

Reasons for Granting Writ 5

Conclusion 13

Appendix A: Opinion of the United States Court of Appeals for the Eleventh Circuit 1a

Appendix B: Opinion of the *En Banc* United States Court of Appeals for the Eleventh Circuit . . . 18a

TABLE OF AUTHORITIES

Cases Cited:

Atkinson v. Anadarko Bank & Trust Co., 808 F.2d 438 (5th Cir. 1987) 8

Bennett v. Berg, 685 F.2d 1053 (8th Cir. 1982) 6

Bennett v. United States Trust Co., 770 F.2d 308 (2d Cir. 1985) 6

B.F. Hirsch v. Enright Refining Co., Inc., 751 F.2d 628 (3d Cir. 1984) 6

Bishop v. Corbitt Marine Ways, Inc., 802 F.2d 122 (5th Cir. 1986) 6

Bodtker v. Forest City Trading Group, 1999 WL 778583 (D. Or. 1999) 11

Brannon v. Boatmen's First Nat. Bank, 153 F.3d 1144 (10th Cir. 1998) 7

Busby v. Crown Supply, Inc., 896 F.2d 833 (4th Cir. 1990) 6,7

Discon, Inc. v. NYNEX Corp., 93 F.3d 1055 (2d Cir. 1996) 7

Emery v. American General Finance, 134 F.3d 1321 (7th Cir. 1998) 9,10,11

Fitzgerald v. Chrysler Corp., 116 F.3d 225 (7th Cir. 1997) 9,10

Fogie v. Thorn Americas, Inc., 190 F.3d 889 (8th Cir. 1999) 7

Garbade v. Great Divide Mining and Milling Corp., 831 F.2d 212 (10th Cir. 1987) 6

Haroco, Inc. v. American Nat'l Bank and Trust Co., 747 F.2d 384 (7th Cir. 1984) 6

Majchrowski v. Norwest Mortgage, Inc., 6 F. Supp. 2d 946 (N.D. Ill. 1998) 11

NCNB Nat'l Bank of N.C. v. Tiller, 814 F.2d 931 (4th Cir. 1987) 7

Puckett v. Tenn. Eastman Co., 889 F.2d 1481 (6th Cir. 1989) 6

Rae v. Union Bank, 725 F.2d 478 (9th Cir. 1984) 6

Reves v. Ernst & Young, 507 U.S. 170 (1993) 5,7,9,11

Securition Magnalock Corp. v. Schnabolk, 65 F.3d 256 (2d Cir. 1995) 8

Schofield v. First Commodity Corp., 793 F.2d 28 (1st Cir.1986) 6

United States v. Computer Sciences Corp., 689 F.2d 1181 (4th Cir. 1982) 6

United States v. Goldin Industries, Inc., 219 F.3d 1271 (11th Cir. 2000) 1,3,4,8

United States v. Goldin Industries, Inc., 219 F.3d 1268 (11th Cir. 2000) (en banc) 1,2,4,5,6

United States v. Hartley, 678 F.2d 961 (11th Cir. 1982) 2

Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 883 F.2d 132 (D.C. Cir. 1989) 6

Statutes Cited:

18 U.S.C. § 1961(3) 5

18 U.S.C. § 1962(c) . . . . . *passim*

18 U.S.C § 1962(d) 2,4

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 2

28 U.S.C. § 1341 4

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the Eleventh Circuit, (App. A, 1a), is reported at 219 F.3d 1271 (11th Cir. 2000). It is that opinion for which review is sought. The opinion of the United States Court of Appeals for the Eleventh Circuit *en banc* which preceded and prompted the panel decision, (App. B, 18a), is reported at 219 F.3d 1268 (11th Cir. 2000).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Judgment was entered on July 27, 2000.

STATUTORY PROVISION INVOLVED

18 U.S.C. § 1962(c)

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Petitioners Goldin Industries, Inc., Goldin of Alabama, Inc., and Goldin Industries Louisiana, Inc., along with five individuals, were named in a twenty-four count indictment. Count One charged Petitioners and three individuals with racketeering in violation of 18 U.S.C. § 1962(c). Count Two charged the same defendants with a racketeering conspiracy in violation of 18 U.S.C. § 1962(d).

After a seven-week trial, the jury acquitted all five individual defendants on all counts. The Petitioner corporations were convicted, *inter alia*, of the RICO violations in Counts One and Two. After a separate forfeiture trial, Petitioners were placed on five years probation and ordered to pay fines, forfeitures, and restitution totaling nearly $4 million.

Petitioners appealed their convictions and sentences to the Eleventh Circuit Court of Appeals. That court had jurisdiction pursuant to 28 U.S.C. § 1291. The court bifurcated the issues on appeal so that the *en banc* court could consider the continued viability of *United States v. Hartley*, 678 F.2d 961, 988 (11th Cir. 1982), which held that the same person or entity could be named as both the RICO person and the RICO enterprise under § 1962(c). The *en banc* court overruled *Hartley*, and remanded to the panel. (App. 22a.) The panel determined that because each Petitioner was a separate corporation, incorporated in a different state, with ongoing businesses involving a separate customer base, each corporation was therefore a person distinct from the RICO

enterprise consisting of the three corporations and four individuals. Thus the court held that each corporation could be liable under § 1962(c). (App. 12a.)

B. STATEMENT OF THE FACTS

This case involves the prosecution of a family-owned scrap metal business that operated in three states as three different corporations. The original corporation, Goldin Industries, Inc., was started in Mississippi in 1942 by Rubin Goldin. He was the father of individual defendant Jack Goldin, and the grandfather of Jack Goldin's three sons, Martin, Steven, and Alan, who also were prosecuted as individual defendants. The family business expanded to Mobile, Alabama, and incorporated there as Goldin of Alabama, Inc. in 1987. In 1990, the business expanded to New Orleans, incorporating as Goldin Industries Louisiana, Inc.

All three corporations were managed from Goldin Industries, Inc. in Mississippi, which acted as the home office. All corporate functions were centralized in Mississippi: hiring and firing of employees, accounting, sales of scrap, pricing of scrap purchased from customers and sold to consumers, insurance, and general administration. Martin Goldin supervised the people handling these matters. The nature and method of operation of the business in each state were identical. The corporate management and ownership were interlocking, and which family members held which particular title had no bearing on corporate decision-making. Decisions about corporate affairs were made jointly by all four family members.

In June 1992, the State of Alabama began an

investigation into short weighing at Goldin of Alabama, culminating in a February 1996 federal indictment charging the four Goldins. Also charged were the three Goldin corporations and an employee of Scott Paper, which was a customer of Goldin Alabama. Among the charges against the three Petitioner corporations were racketeering in violation of 18 U.S.C. § 1962(c), and conspiracy to violate that statute, under 18 U.S.C. § 1962(d).

In its RICO charge, the Government alleged that the three corporations, along with Martin, Steven and Jack Goldin "conduct[ed] and participate[d] in the conduct of the affairs of the enterprise through a pattern of racketeering activity." The pattern of racketeering activity consisted of various acts of mail fraud in violation of 18 U.S.C. § 1341, all relating to schemes to systematically cheat customers by short weighing loads of scrap, misclassifying scrap, and inflating deductions for off-grade scrap and trash. The Government described the enterprise as an association-in-fact enterprise consisting of the four Goldins and the three Goldin corporations.

After a lengthy trial, the jury acquitted all of the individual defendants on all counts. The three corporations were convicted on all charged counts, including the RICO charges under 18 U.S.C. §§ 1962(c) and (d).

On appeal, after the *en banc* decision reversed the Eleventh Circuit's long-standing minority position on the distinctiveness requirement of 18 U.S.C. § 1962(c), (App. 22a), a panel of the court upheld the convictions. The panel concluded that because each Goldin corporation was a separate corporation, incorporated in a different state and with a separate ongoing business and separate customer base, (App. 12a), each corporation was therefore distinct from the

enterprise, which consisted of the three corporations and individual family members, for purposes of liability under 18 U.S.C. § 1962(c).

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari in this case to resolve a conflict between the circuit courts of appeal over the liability of business entities under 18 U.S.C. § 1962(c), which provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Section § 1962(c) is limited to persons "employed by or associated with an enterprise," and requires a showing that the defendant conducted the "*enterprise's* affairs," not just the defendant's own affairs. *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993) (emphasis in original). For purposes of the RICO statute, a "person" includes a corporation, which is "an entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3). After the Eleventh Circuit's *en banc* decision in this case, (App. 22a), all twelve circuit courts of appeals now require that the RICO "person" prosecuted under 18 U.S.C. § 1962(c) be distinct from the RICO "enterprise" whose affairs it conducts or participates in

through a pattern of racketeering activity.[1]

In applying this distinctiveness requirement in the context of related business entities that are named as a RICO "person," a significant split has emerged between the courts of appeals.

A minority of the circuits, now joined by the Eleventh Circuit by its decision in the instant case, require only that the "person" have a separate and distinct existence from the enterprise in order to meet the distinctiveness requirement under 18 U.S.C. § 1962(c). *See Goldin Industries, Inc.* (App. 22a) (§ 1963(c) convictions upheld because each defendant is separate and distinct corporation, incorporated in a different state, with ongoing businesses involving a separate customer base); *Haroco v. American Nat'l Bank*, 747 F.3d 384, 402 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985) (subsidiary corporation could be liable under § 1962(c) for conducting the affairs of its parent corporation through a pattern of racketeering activities).

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1. *See Goldin v. United States*, 219 F.3d 1268 (11th Cir. 2000); *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 883 F.2d 132 (D.C. Cir. 1989), *rev'd in part on other grounds*, 913 F.2d 948 (D.C. Cir. 1990) (en banc); *Puckett v. Tenn. Eastman Co.*, 889 F.2d 1481 (6th Cir. 1989); *Garbade v. Great Divide Mining and Milling Corp.*, 831 F.2d 212 (10th Cir. 1987); *Bishop v. Corbitt Marine Ways, Inc.*, 802 F.2d 122 (5th Cir. 1986); *Schofield v. First Commodity Corp.*, 793 F.2d 28 (1st Cir. 1986); *Bennett v. United States Trust Co.*, 770 F.2d 308 (2d Cir. 1985); *B.F. Hirsch v. Enright Refining Co., Inc.*, 751 F.2d 628 (3d Cir. 1984); *Haroco, Inc. v. American Nat'l Bank and Trust Co.*, 747 F.2d 384 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985); *Rae v. Union Bank*, 725 F.2d 478 (9th Cir. 1984); *United States v. Computer Sciences Corp.*, 689 F.2d 1181 (4th Cir. 1982), *overruled in part, Busby v. Crown Supply, Inc.*, 896 F.2d 833 (4th Cir. 1990) (en banc); *Bennett v. Berg*, 685 F.2d 1053 (8th Cir. 1982).

A majority of the circuits have declined to follow the *Haroco* view, expressing a concern that if nothing more than a separate and distinct existence between related corporate entities is required, the element of control enunciated by the Court in *Reves*, 507 U.S. at 185, is ignored and there is a risk of a dramatic expansion of RICO liability on the basis of a business organization choice which is totally irrelevant to the purposes of RICO. *Fogie v. Thorn Americas, Inc.*, 190 F.3d 889, 898 (8th Cir. 1999) ("A parent and a subsidiary are separate legal entities, but this is not enough....there must be a greater showing that the parent and subsidiary are distinct than the mere fact that they are separate legal entities. To conclude otherwise would be to read the distinctiveness requirement out of RICO."); *Brannon v. Boatmen's First Nat. Bank*, 153 F.3d 1144, 1147-49 (10th Cir. 1998) (defendant bank's existence as a subsidiary of its holding company alone does not meet conduct or participation requirement; "Dramatically expanding RICO liability because of a business organization choice makes little sense from a policy perspective."); *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055, 1063-64 (2d Cir. 1996) (interrelated corporations "acting within scope of a single corporate structure, guided by a single corporate consciousness" do not meet distinctiveness requirement; "It would be inconsistent for a RICO person acting within the scope of its authority, to be subject to liability simply because it is separately incorporated, whereas otherwise it would not be held liable...."); *NCNB Nat'l Bank of N.C. v. Tiller*, 814 F.2d 931, 936 (4th Cir. 1987), *overruled on other grounds by Busby v. Crown Supply, Inc.*, 896 F.2d 833 (4th Cir. 1990) (en banc) (holding that defendant bank is not distinct from its holding company, the

alleged enterprise, for purposes of 1962(c)); and *Atkinson v. Anadarko Bank & Trust Co.*, 808 F.2d 438, 441 (5th Cir. 1987) (affirming j.n.o.v. due to lack of evidence that defendant bank was distinct from its holding company, the enterprise).

The problem with the approach of the *Haroco* (and now *Goldin*) view is that by simply requiring the existence of a separate and distinct legal entity, RICO liability is extended on the basis of a business decision regarding corporate structure which is unrelated to any racketeering purpose or activity at which the RICO statutory scheme was directed. In this case, the three Petitioner corporations were convicted of § 1962(c) violations simply because the Goldin family chose to separately incorporate its operation in three states. The existence of the three separate corporations in no way facilitated or enabled the corporations to conduct the "enterprise," comprised of its related corporate entities and individuals, through a pattern of racketeering activity.[2] Had the Goldins chosen to operate all three corporations as one legal entity doing business in three locations, the business entity would not have been distinct from the enterprise, and there would have been no § 1962(c) liability. Their decision to separately incorporate the unified family business in three states, while having nothing to do with racketeering activity,

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2. It is for this reason that the Eleventh Circuit's reliance on *Securition Magnalock Corp. v. Schnabolk*, 65 F.3d 256 (2d Cir. 1995), (App. 11a-12a), is inappropriate. In *Securition*, the separate corporations were used to create multiple sources, appearing to be independent entities, for false rumors and industry complaints against their competitor, thereby "conducting" the affairs of the enterprise, consisting of the two corporations and their operator. *Id.* at 264.

became the sole determinative factor in their exposure to liability under § 1962(c).

The reason for the requirement of something more than the mere existence of a separate and distinct legal entity flows from the statutory element of control. Under the clear wording of § 1962(c), the RICO "person" must "conduct or participate...in the conduct of such enterprise's affairs through a pattern of racketeering activity." As this Court held in *Reves*, the term "conduct" implies some degree of direction over the enterprise's activities, while "participate" implies merely some part in that direction. 507 U.S. at 177-79. Unless more is required than a simple showing of the existence of separate legal entities, this distinctiveness requirement, explicit in the statutory language and recognized by this Court in *Reves*, is read out of the statute. In other words, a business's decision to separately incorporate its subsidiaries or related businesses or to conduct business through agents, would in itself subject that business to RICO liability which would not otherwise exist.

Judge Posner of the Seventh Circuit Court of Appeals has constructed a method of analysis in these circumstances to harmonize the broad wording of the statute with the intent of the statute's authors. *See Emery v. American General Finance*, 134 F.3d 1321, 1324 (7th Cir. 1998), and *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 227 (7th Cir. 1997). To properly interpret the distinctiveness requirement of § 1962(c), Judge Posner proposes a "family resemblance test" to "determine how close to the prototype the case before the court is." *Fitzgerald*, 116 F.3d at 227. He defined the prototypical RICO case as

one in which a person bent on criminal activity

> seizes control of a previously legitimate firm and uses the firm's resources, contacts, facilities, and appearance of legitimacy to perpetuate more, and less easily discovered, criminal acts than he could do in his own person, that is, without channeling his criminal activities through the enterprise that he has taken over.

Id. (citations omitted). *Fitzgerald* involved a § 1962(c) RICO suit against Chrysler for warranty fraud, alleging that the enterprise was the "Chrysler family," comprised of the parent corporation and its subsidiaries, plus dealers and financing trusts. *Id.* at 226. Judge Posner concluded that this exceeds even the second step beyond the prototypical case, where "the criminal seizes control of a subsidiary of a corporation and perverts the subsidiary into a criminal enterprise that manages in turn to wrest sufficient control or influence over the parent corporation to use it to commit criminal acts;" *Id.* at 227. Noting that if Chrysler were a totally integrated enterprise and therefore did business only through its employees rather than agents, it could not be held liable under § 1962(c), Judge Posner concluded that the case failed the "family resemblance test" because Chrysler "has not established dealerships in order to fool car buyers into thinking that they are not dealing with the 'racketeer' Chrysler, or to enable Chrysler to engage in fraud on a scale that would be impossible if it internalized the dealership function." *Id.* at 228.

This analysis was extended by Judge Posner in *Emery*. In upholding the dismissal of a class action under § 1962(c) for illegal "loan flipping," Judge Posner stated that to be liable under RICO, the defendant "must be shown to use its

agents or affiliates in a way that bears at least a family resemblance to the paradigmatic RICO case in which a criminal obtains control of a legitimate (or legitimate-appearing) firm and uses the firm as the instrument of his criminality." 134 F.3d at 1324. In *Emery*, as in *Chrysler*, there was no allegation that by using subsidiaries or agents rather than divisions the enterprise somehow made it easier to commit or conceal the fraud. *Id.* Therefore, the element of control was lacking and the distinctiveness requirement of § 1962(c) was not fulfilled. *Id.*

This Court's decision in *Reves* established beyond dispute that a RICO "person" must conduct or participate in the RICO "enterprise's affairs." 507 U.S. at 185. All of the circuits now agree that the clear wording of § 1962(c) requires that the RICO "person" be distinct from the RICO "enterprise." They do not, however, agree as to whether corporate form or corporate substance should be determinative. This conflict results in drastically different corporate exposure under § 1962(c) depending upon the circuit in which the RICO action is brought. *Compare Majchrowski v. Norwest Mortgage, Inc.*, 6 F. Supp. 2d 946, 957 (N.D. Ill. 1998), *with Bodtker v. Forest City Trading Group*, 1999 WL 778583, at *11-12 (D. Or. 1999).

"Distinctiveness" means more than just a technical incorporation difference. Unless distinctiveness turns on facts related to the purpose of the RICO statute rather than simply the corporate structure a business has decided to implement unrelated to any RICO activity, the reach of § 1962(c), both civil and criminal, will be unfairly expanded beyond the bounds of reasonable application of the law, extending to every allegation of fraud against a corporation.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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October 2000

APPENDIX A
OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JULY 27, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JULY 27 2000
THOMAS K. KAHN
CLERK

No. 97-6163

D.C. Docket No. 95-00158-CR-5

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GOLDIN INDUSTRIES, INC.,
GOLDIN OF ALABAMA INC., et al.,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Alabama

(July 27, 2000)

Before CARNES, BARKETT, and MARCUS, Circuit Judges.

BARKETT, Circuit Judge:

Goldin Industries, Inc. ("Goldin Mississippi"[1]), Goldin of Alabama, Inc. ("Goldin Alabama"), and Goldin Industries Louisiana, Inc. ("Goldin Louisiana") (collectively the "Goldin Corporations"), appeal their convictions for racketeering activities in violation of the Racketeer Influenced and Corrupt Organizations Statute ("RICO"), 18 U.S.C. § 1962(c), and conspiracy to engage in such activities in violation of RICO § 1962(d). The Goldin Corporations also appeal from the final judgment of forfeiture and order mandating restitution under 18 U.S.C. § 1963(a)(1) and (a)(3) of all proceeds obtained from the racketeering activity.

All three Goldin corporations are in the scrap metal business. They buy and then resell large quantities of ferrous metals such as steel as well as more valuable non-ferrous metals such as stainless steel, brass, copper, and aluminum. Goldin Mississippi was initially started by Rubin Goldin as a cow hide and scrap business in Biloxi, Mississippi in 1942. Rubin Goldin's son, Jack, took over that business in 1950, and three of Jack Goldin's four sons eventually joined the business. Alan ran the steel division and manufacturing, Steven was in charge of the non-ferrous division, and Martin administered the entire business. In 1987, the three Goldin sons purchased a failing scrap business in Mobile, Alabama, which was incorporated as Goldin Alabama. In 1990, Jack Goldin and the three sons opened a business in New Orleans, which was incorporated as Goldin Louisiana.

The Goldin Corporations and Jack, Martin, Alan, and

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1. Throughout the indictment and in proceedings in the district court, Goldin Industries, Inc. is referred to as Goldin Mississippi. In order to avoid confusion, we also refer to that corporation as Goldin Mississippi.

Steve Goldin were all charged with violations of § 1962(c) in connection with their schemes to: (1) defraud their large-volume ("industrial") customers by systematically shortweighing these customers' loads of scrap; (2) cheat customers by hiding valuable non-ferrous scrap in loads of less-valuable ferrous scrap; and (3) inflate deductions for no-value scrap in loads of off-grade scrap and trash. In the case of each RICO allegation, the government charged the Goldin corporations with predicate acts, consisting of mail fraud, in violation of 18 U.S.C. §§ 1341 and 2. In short, each Goldin corporation was alleged to have violated RICO by sending invoices and checks to the customers who had been cheated in the Goldin Corporations' various schemes. The invoices and checks fraudulently misrepresented the amounts actually due to the victims of these schemes.

Ultimately, the jury acquitted the individual Goldin defendants but convicted all three Goldin corporations of racketeering in violation of 18 U.S.C. § 1962(c) (Count 1)[2]

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2. Count 1 consisted of four separate RICO charges, styled RICO 1-4. RICO 1alleged mail fraud for sending fraudulent checks and invoices in connection with a scheme at all three Goldin corporations to defraud industrial customers by shortweighing the loads brought to the Goldin corporations by approximately 20%, in violation of 18 U.S.C. §§ 1341 and 2. RICO 2 alleged mail fraud at Goldin Alabama for sending fraudulent checks and invoices to Scott Paper Company in connection with its scheme to hide valuable scrap in less valuable loads of scrap, in violation of 18 U.S.C. §§ 1341 and 2. RICO 3 alleged mail fraud at Goldin Mississippi for sending fraudulent checks and invoices in relation to its scheme to take fraudulent deductions for no-value scrap in loads of off-grade scrap and trash delivered to it from its customer, Frymaster, in violation of 18 U.S.C. §§ 1341 and 2. RICO 4 alleged mail fraud at Goldin Mississippi and Goldin Louisiana for sending fraudulent checks and invoices in relation to

and racketeering conspiracy under 18 U.S.C. § 1962(d) (Count 2).[3] Pursuant to 18 U.S.C. § 1963(a)(1) & (3), which provide that any person convicted of violating any provision of § 1962 must forfeit to the United States any interest acquired or maintained in violation of § 1962, the government sought to obtain forfeiture judgments and restitution awards reflecting the amounts that each corporation had derived from its schemes.[4] After the subsequent one-day forfeiture trial, the district court sentenced all three corporations to five years probation. In addition, Goldin Alabama was fined $560,000.00, ordered to forfeit $219,849.22 and to pay restitution of $219,849.22 under RICO, 18 U.S.C. § 1963, ordered to forfeit $25,387.94 under the money laundering statute, 18 U.S.C. § 982(a)(1), and assessed $3800.00.

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their schemes to take fraudulent deductions for no-value scrap in loads of off-grade scrap and trash delivered to them from their customer, Pellerin, in violation of 18 U.S.C. §§ 1341 and 2.

3. Goldin Alabama was also convicted of mail fraud in violation of 18 U.S.C. §§ 1341 and 2 in connection with five mailings to Scott Paper (Counts 9-13); conspiracy to commit mail fraud against Scott Paper in violation of 18 U.S.C. § 371 (Count 14); money laundering in violation of 18 U.S.C.§ 1956(a)(1)(A)(i) and (a)(1)(B)(i), consisting of payments to Scott Paper's scrap yard manager, James Denson, through a fictitious Goldin Alabama account (Counts 15-24); and conspiracy to commit the same money laundering in violation of 18 U.S.C. § 371 (Count 25). Goldin Alabama does not challenge these convictions on this appeal, nor does it challenge the forfeiture it was ordered to pay in connection with its money laundering convictions.

4. 18 U.S.C. § 3551(c) permits a court to order a corporate defendant convicted of violating a federal statute to pay fines, forfeiture, and restitution in addition to any other sentence imposed.

Goldin Mississippi was fined $1,000,000.00, ordered to forfeit $419,835.18 and to pay restitution of $419,835.18 under RICO, and assessed $400.00. Goldin Louisiana was fined $1,000,000.00, ordered to forfeit $47,712.74 and to pay restitution of $47,712.74 under RICO, and assessed $400.00. The Goldin Corporations now appeal both their convictions under 18 U.S.C. § 1962(c) and (d) and the forfeiture and restitution judgments under 18 U.S.C. § 1963.

DISCUSSION

1. RICO Convictions under 18 U.S.C. § 1962(c) and (d)

The three Goldin Corporations raise only one challenge to their convictions. They argue that they constitute both the "person" and the "enterprise" referenced in 18 U.S.C. § 1962(c) and, therefore their convictions should be vacated. 18 U.S.C. § 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Thus, as the trial court correctly instructed the jury, to convict under § 1962(c), the government must prove: (1) the existence of an enterprise which affects interstate or foreign commerce, (2) that the defendant associated with the enterprise; (3) that the defendant participated in or conducted the enterprise's affairs; and (4) that the participation in or conduct of the

enterprise's affairs was through a pattern of racketeering activities. *See United States v. Weinstein*, 762 F.2d 1522, 1536 (11th Cir. 1985), *quoting United States v. Phillips*, 664 F.2d 971, 1011 (5th Cir. Unit B 1981).

A "pattern" of racketeering activity requires that a defendant commit two acts of racketeering activity within a ten-year period. 18 U.S.C. § 1961(5). Racketeering activity is defined as the commission of certain federal crimes, including for our purposes here, the crime of mail fraud pursuant to 18 U.S.C. § 1341. The terms "person" and "enterprise" in the statute have been specifically defined by Congress. A person liable under § 1962(c) is "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3). An "enterprise" under the statute is "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). Moreover, under our case law, a RICO enterprise need not possess an "ascertainable structure" distinct from the associations necessary to conduct the pattern of racketeering activity. *Weinstein*, 762 F.2d at 1537, n.13 (rejecting the holding in *United States v. Bledsoe*, 674 F.2d 647, 665 (8th Cir. 1982), requiring that the enterprise possess such a structure, distinct from the pattern of racketeering activities).

The Supreme Court has held that the existence of an enterprise "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *United States v. Turkette*, 452 U.S. 576, 583 (1981). We have held that *Turkette* left intact this Circuit's holding in *United States v.*

Elliott, 571 F.2d 880 (5th Cir. 1973),[5] that the definitive factor in determining the existence of a RICO enterprise is the existence of an association of individual entities, however loose or informal, that furnishes a vehicle for the commission of two or more predicate crimes, that is, the pattern of racketeering activity requisite to the RICO violation. Id. at 898. *See also United States v. Hewes*, 729 F.2d 1302, 1311 (11th Cir.1984) ("a RICO enterprise exists where a group of persons associates, formally or informally, with the purpose of conducting illegal activity"); *United States v. Cagnina*, 697 F.2d 915, 920-21 (11th Cir. 1983) (upholding Cagnina's RICO conviction for his participation in an "informal criminal network engaged in racketeering activity").

In this case the Goldin Corporations argue that because each corporation is named as a defendant and is also included in the named enterprise, their convictions under 1962(c) must be vacated. We bifurcated the issues in this appeal so that the en banc court could consider the continued viability of *United States v. Hartley*, 678 F.2d 961, 988 (11th Cir. 1982), which held that the same person or entity could be named as both the RICO person and the RICO enterprise under § 1962(c). Hartley has now been overruled by the en banc court. *United States v. Goldin Industries, Inc.*, __ F.3d __ (11th Cir. 2000) (*en banc*). Thus, to the extent that a defendant is both the "person" and the "enterprise," a conviction of that defendant under § 1962(c) now cannot stand.

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5. In *Bonner v. Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981.

The government argues, however, that in this case each corporate defendant is a person within the meaning of the statute and that the enterprise as it relates to each corporate defendant is not the same corporation, but rather the association of all the corporations along with the individual defendants.[6] The government contends that this group constitutes an entity distinct from each individual corporate defendant and is the enterprise within the meaning of § 1962(c).

Initially, we recognize that a defendant can clearly be a person under the statute and also be *part* of the enterprise. The prohibition against the unity of person and enterprise applies only when the singular person or entity is defined as both the person and the only entity comprising the enterprise. *See Goldin Industries, Inc.*, __ F.3d __; *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union, 639*, 883 F.2d 132 (D.C. Cir. 1989), *rev'd in part on other grounds*, 919 F.2d 948 (D.C. Cir. 1990) (*en banc*); *Puckett v. Tenn. Eastman Co.*, 889 F.2d 1481 (6th Cir. 1989); *Garbade v. Great Divide Mining and Milling Corp.*, 831 F.2d 212 (10th Cir. 1987); *Bishop v. Corbitt Marine Ways, Inc.*, 802 F.2d 122 (5th Cir. 1986); *Schofield v. First Commodity Corp.*, 793 F.2d 28 (1st Cir. 1986); *Bennett v. United States Trust Co. of New York*, 770 F.2d 308 (2nd Cir. 1985); *B.F. Hirsch v. Enright Refining Co., Inc.*, 751 F.2d 628 (3rd Cir. 1984); *Haroco, Inc. v. American Nat'l Bank and Trust Co. of*

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6. The indictment names each corporate defendant as a person and describes the association-in-fact enterprise as comprised of seven named defendants, Jack Goldin, Martin Goldin, Steve Goldin, Alan Goldin, Goldin Mississippi, Goldin Alabama, and Goldin Louisiana.

Chicago, 747 F.2d 384 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985); *Rae v. Union Bank*, 725 F.2d 478 (9th Cir. 1984); *United States v. Computer Sciences Corp.*, 689 F.2d 1181 (4th Cir. 1982), *overruled in part*, *Busby v. Crown Supply, Inc.*, 896 F.2d 833 (4th Cir. 1990); *Bennett v. Berg*, 685 F.2d 1053 (8th Cir. 1982). To find that a defendant cannot be *part* of the enterprise would undermine the purposes of the RICO statute. Indeed, RICO requires that the person be "employed by or associated with" the enterprise. 18 U.S.C. § 1962(c). Thus, a § 1962(c) defendant may be simultaneously a RICO person and a *member* of the RICO enterprise. *Cullen v. Margiotta*, 811 F.2d 698, 730 (2d Cir. 1987). Although RICO forbids the imposition of liability where the enterprise is nothing more than a subdivision or a part of the person, the requirement does not run the other way. *Davis v. Mutual Life Ins. of New York*, 6 F.3d 367, 378 (6th Cir. 1993). Thus, the fact that each corporation was a defendant "person" and also *part* of the union of corporations which was the enterprise does not as a matter of law preclude a conviction.

The Goldin Corporations argue, however, that because all of the corporate defendants were offshoots of the initial Goldin corporation and had overlapping ownership, they were in reality only one entity and therefore the alleged enterprise was not distinct from the defendant persons. The Goldin Corporations argue that the circumstances here are like those in *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055 (2nd Cir. 1996), and accordingly, we should hold, as the Second Circuit held in *Discon*, that the three corporations are in reality one and the same.

In *Discon* the defendants were NYNEX Corp., a holding company, and two of its wholly-owned subsidiaries,

MECo, and NYTel. The enterprise alleged was the union of all three corporations. The factual basis for the complaint was an alleged scheme whereby MECo would purchase telephone removal services on behalf of NYTel at inflated prices. NYTel would then overcharge its customers on the basis of these inflated prices. However, at the end of the year, MECo would receive a secret "rebate" from the seller which it would then pass on to NYTel. This scheme enabled MECo. and NYNEX to generate increased revenues derived from NYTel's telephone monopoly. *Id.* at 1057-58. In that case, however, the Second Circuit found that MECo was not only a wholly owned subsidiary of NYNEX, but its only purpose was to serve as the purchasing agent for NYTel. Unlike other intermediaries such as wholesalers, who may transfer goods and services to a number of different purchasers, MECo did not resell removal services to any other telephone company. Thus, MECo did not compete in the overall market "but only in the 'market' for a single buyer." *Id.* at 1060. This arrangement, the court found, was analogous to that of an internal purchasing agent. The court noted that had MECo been organized as a purchasing department within NYTel rather than as a separate corporate entity, it would be undisputed that MECo did not compete with Discon. In this context the court held that the corporations were "acting within the scope of a single corporate structure, guided by a single corporate consciousness," *id.* at 1064, and ruled that "[i]t would be inconsistent for a RICO person, acting within the scope of its authority, to be subject to liability simply because it is separately incorporated." *Id.*[7]

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7. In *Fogie v. Thorn Americas, Inc.*, 190 F.3d 889, 898 (8th Cir. 1999), the Eighth Circuit held that a number of wholly-owned subsidiary corporations cannot be RICO defendants where the parent corporation is

Rather, we find the more analogous case in the Second Circuit to be *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256 (2nd Cir. 1995).[8] There, the Second Circuit found that notwithstanding common ownership and a common officer and agent, each distinct corporation could be indicted individually as a person under § 1962(c) while also being considered jointly as constituting the enterprise. *Id.* at 263. Charles Schnabolk was the President and owner of Kalon, one of the corporate defendants. He was also the principal owner of the other corporate defendant, Andra, later selling his controlling interest to undisclosed individuals and served as Andra's Vice President. Kalon employed between six and 15 people; Andra had three. The two companies shared office space and all of the racketeering acts were performed by Schnablock representing one or the other of the corporations. Unlike MECo in *Discon*, which functioned only to serve as the purchasing agent of NYTel, the corporations in *Securitron* were, as the Second Circuit put it, active, operating, ongoing businesses, each with a presence in the marketplace, "rather than two stacks of stationery." *Id.* at 263. Here, as in

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named as the enterprise, because a subsidiary cannot be sufficiently distinct from its parent or other related subsidiaries so as to satisfy § 1962(c)'s distinctiveness requirement. On the other hand in *Haroco*, 747 F.2d at 402-403, the Seventh Circuit held in a civil RICO case that a subsidiary corporation could be liable under § 1962(c) for conducting the affairs of its parent corporation through a pattern of racketeering activities. As this case does not involve wholly-owned subsidiaries conducting a pattern of racketeering activity through an enterprise comprised only of themselves and the parent corporation, we take no position on this question.

8. The *Discon* court did not cite to *Securitron* indicating that the court did not see *Discon* as addressing the same question.

Securitron, each Goldin corporation is a separate and distinct corporation. Each is incorporated in a separate state. Each is a separate ongoing business with a separate customer base. Each is free to act independently and advance its own interests contrary to those of the other two corporations.

We are satisfied that under the facts of this case, the Goldin corporations are distinct persons for the purposes of 18 U.S.C. § 1962(c) and that each Goldin corporation is distinct from the association consisting of the union of all three Goldin corporations which comprises the enterprise for the purposes of § 1962(c). We thus find no reason to vacate the corporations' convictions under § 1962(c) on this basis . As the Goldin Corporations' challenge to their conviction for RICO conspiracy under § 1962(d)[9] derived from their challenge to their indictment under § 1962(c), that challenge also fails.

2 Challenges to Forfeiture Judgements and Restitution Amounts

a. Insufficiency of the Evidence as to Goldin Mississippi

Subsequent to the criminal conviction in this case, a judgment of forfeiture against Golden Mississippi was entered in the amount of $319,669.11, half of what the government had requested. Goldin Mississippi was also ordered to pay restitution in the same amount. Goldin Mississippi first argues that the forfeiture judgment and restitution order cannot stand because the government failed to present sufficient evidence of

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9. 18 U.S.C. § 1962(d) provides that, "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."

the predicate acts pertaining to the fraudulent invoices and checks mailed to Moss Point Marine, Trinity Marine - Gulfport, and Avondale Gulfport Maine, Inc., relating to the amounts of the forfeiture judgment. Initially, we note that Goldin Mississippi was charged with three sets of predicate acts in Count 1 of the indictment. The RICO statute requires that the government show only two predicate acts. Thus, Goldin Mississippi's criminal conviction under Count 1 of the indictment is still valid based on any two of the other predicate acts alleged, and Goldin Mississippi does not challenge its conviction under § 1962(c) on the sufficiency of the evidence of the predicate acts. The challenge here is only relevant to the determination of the amount of its forfeiture and restitution order.

Sufficiency of the evidence is a question of law to be reviewed *de novo*. *United States v. Suba*, 132 F.3d 662, 671 (11th Cir. 1998). In this case, we review the evidence to determine whether "a reasonable jury, viewing the evidence and all reasonable inferences therefrom in the light most favorable to the Government could find the Defendant[s] guilty as charged beyond a reasonable doubt." *United States v. Navarro-Ordas*, 770 F.2d 959, 966 (11th Cir. 1985).[10]

Although the government's case against Goldin Mississippi is largely based on circumstantial evidence, we have held that a jury is entitled to conclude that a defendant is guilty beyond a reasonable doubt based on "strong

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10. The government contends for the first time on appeal that the correct burden of proof is preponderance of the evidence rather than beyond a reasonable doubt. We have never decided this issue with respect to RICO's forfeiture provision. We need not decide the issue here, however, as the convictions stand even under the higher burden of proof.

circumstantial evidence." *Id.* at 966. We find the evidence sufficient in this case. The government presented evidence that Goldin-Mississippi had modified its scale equipment to allow weight tickets to be printed without a truck on the scale, to prevent the date and time from being printed on each weight ticket, and to prevent any indication that a weight had been entered manually. [20 R 131-156; 22 R 224.] Goldin Mississippi also used non-sequentially numbered weight tickets. [23 R 21.] These were essentially the same modifications to standard weighing equipment that had been implemented at Goldin's other two locations in furtherance of the shortweighing schemes at those locations. Steven Goldin, who ran Goldin Mississippi, played a central role in training those responsible for carrying out the Goldin Corporations' shortweighing schemes at Goldin Louisiana and Goldin Alabama.

The jury heard considerable evidence of shortweighing at Goldin Mississippi. According to the weighmaster at Goldin Mississippi, Lydia Flettrich, who was not a participant in the Goldin Corporations' shortweighing scheme, once or twice every day, Steven Goldin would prevent her from weighing a load so that he could do so himself. [23 R 21-27.] Flettrich testified that she saw Steven Goldin printing out weight tickets when there was no truck on the scales. [23 R 25-26.] Cherlyn Epperly, Steven Goldin's assistant, testified that she would occasionally hear someone, presumably Steven Goldin, using the printer in the evenings after Goldin Mississippi had closed for the day. [23 R 134-137.] The back-up weighmaster at Goldin Mississippi testified that she saw Steven Goldin shortweigh customers by printing net weights and representing those weights as gross weights. [23 R 80-91.] Most significantly in terms of establishing that Goldin Mississipi

engaged in large-scale shortweighing of industrial customers. Flettrich testified that, for industrial customers, she simply indicated the gross weight on the weight ticket and did not calculate the net weight by subtracting the "tare weight," that is, the weight of the truck. [22 R 221-226.] She then placed the weight tickets on Steven Goldin's desk, and Steven Goldin would later calculate the net weight. [22 R. 217; 23 R 31-35.] After law enforcement officers raided Goldin Alabama in August 1992, Goldin Mississippi switched to using sequentially numbered tickets, and its weighmaster was now entrusted with the responsibility of calculating the net weight on industrial weight tickets [36 R 114-115.], suggesting an attempt to cover-up its illegal activities after Goldin Mississippi realized that the government was aware of the shortweighing scheme. Evidence was presented that the three industrial customers that were the recipients of the four allegedly fraudulent mailings testified that they did not independently weigh their loads, and that Steven Goldin knew which customers did not weigh their loads. We find that a reasonable jury could have drawn reasonable inferences linking the named mailings to the fraudulent scheme based on the evidence presented at trial. Accordingly, we find no merit to Goldin Mississippi's argument that the government failed to present sufficient evidence of the predicate acts necessary to support the forfeiture judgment.[11]

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11. We also find no merit to Goldin Mississippi's argument that the evidence that the government relied on to prove the amount of forfeiture against it for the racketeering activities alleged in Rico Act 3 of Count 1 of the indictment, relating to its improper deductions for no-value scrap in loads of off-grade scrap delivered to it from its customer, Frymaster, did not support the calculations and assumptions offered to the jury during the forfeiture proceedings.

b. Admission into Evidence of the Summary Charts

The remaining challenge to the forfeiture judgment and restitution award raised by all three Goldin corporations is that the district court erred by admitting into evidence the summary charts and testimony presented by the government's expert witness regarding the amount of fraudulent proceeds from the shortweighing schemes, thus transforming "the forfeiture proceeding into an unfair 'trial by charts' in which the amount of forfeiture was not supported by sufficient primary evidence." The jury rendered forfeiture verdicts against Goldin Alabama and Goldin Louisiana exactly equal to the amounts sought by the government. In the case of Goldin Mississippi, the jury returned a forfeiture verdict of half the amount sought by the government. The Goldin Corporations contend that the government's summary charts presented during the forfeiture proceeding were inadmissible because they were inaccurate and did not fairly represent the evidence before the jury. Thus, the charts lacked a proper evidentiary foundation.

At the forfeiture proceeding, the government presented only one witness, FBI analyst Lavonda Davis, accompanied by charts summarizing the government's evidence introduced during the guilt/innocence phase of the trial. When the government introduced the charts to which the Goldin Corporations now object, counsel for the Goldin Mississippi, stated "Judge, we've agreed to her charts and she's agreed to ours, Judge." [53 R 61.] Later when the government charts were re-offered with a handwritten addition, counsel for Goldin Louisiana reiterated, "We don't have any objection to them." [53 R 76.] They also raised no objections of Davis' testimony during the forfeiture proceeding. It is clear from the record that the charts from both sides were admitted into evidence with the

agreement of all the parties. Under these circumstances, the Goldin Corporations cannot now be heard to challenge their admission.

CONCLUSION

For the foregoing reasons, the Goldin Corporations' convictions for racketeering and racketeering conspiracy under 18 U.S.C. §§ 1962(c) and (d) and the attendant fines, restitution and forfeiture orders are AFFIRMED.

APPENDIX B
OPINION OF THE *EN BANC* UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JUNE 29, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-6163

D.C. Docket No. 95-00158-CR-5

FILED
U.S. COURT OF
APPEALS
ELEVENTH CIRCUIT
JUNE 29 2000
THOMAS K. KAHN
CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GOLDIN INDUSTRIES, INC.,
GOLDIN OF ALABAMA INC., et al.,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Alabama

(June 29, 2000)

Before ANDERSON, TJOFLAT, EDMONDSON, COX, BIRCH, DUBINA, BLACK, CARNES, BARKETT, HULL, MARCUS and WILSON, Circuit Judges.

BARKETT, Circuit Judge:

Goldin Industries, Inc. ("Goldin Mississippi"[1]), Goldin of Alabama, Inc. ("Goldin Alabama"), and Goldin Industries Louisiana, Inc. ("Goldin Louisiana") (collectively "the Goldin Corporations"), appeal their convictions for racketeering activities in violation of the Racketeer Influenced and Corrupt Organizations Statute ("RICO"), 18 U.S.C. § 1962(c), and conspiracy to engage in such activities in violation of RICO § 1962(d). The Goldin Corporations also appeal from the Final Judgement of Forfeiture and Order mandating restitution under 18 U.S.C. § 1963(a)(1) and (a)(3) of all proceeds obtained from the racketeering activity.

The indictment against the Goldin Corporations under § 1962(c) alleges an "enterprise as defined in Title 18, U.S.C. § 1961(4), consisting of Martin C. Goldin, Steven L. Goldin, Jack Goldin, Goldin-Mississippi, Goldin-Alabama, Goldin-Louisiana, Alan H. Goldin" and others. It further names the same parties, except for Alan H. Goldin, as "persons employed by and associated with the enterprise as described above. . . ." The individual defendants were acquitted.

On appeal, the Goldin Corporations first argue that the RICO convictions must be reversed because the unambiguous language of § 1962(c) requires that the RICO "person" prosecuted under the statute be separate and distinct from the RICO "enterprise" which has its affairs conducted through a pattern of racketeering activity. The Goldin Corporations make this argument notwithstanding a prior opinion of this

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1. Throughout the indictment and in proceedings in the District Court, Goldin Industries, Inc. is referred to as Goldin Mississippi. In order to avoid confusion, we also refer to that corporation as Goldin Mississippi.

court holding to the contrary. *United States v. Hartley*, 678 F.2d 961, 988 (11th Cir. 1982). Both parties conceded in their briefs and at oral argument that this argument is foreclosed if *Hartley* has continued viability. The Goldin Corporations argue that *Hartley* was wrongly decided and should be revisited. Because a panel of this court cannot reconsider a decision of another panel,[2] we now reconsider *United States v. Hartley en banc*.

DISCUSSION

18 U.S.C. § 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

In *Hartley*, as the first appellate court to address this question, this Court held that a corporation may be simultaneously named as a liable "person" and as the "enterprise" in § 1962(c) actions. After *Hartley* was decided, every other circuit had the opportunity to address the question and unanimously held, contrary to *Hartley*, that the defendant named in § 1962(c) indictment must be separate and distinct from the "enterprise"

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2. *See United States v. Hogan*, 986 F.2d 1364, 1369 (11th Cir. 1993) ("It is the firmly established rule of this Circuit that each succeeding panel is bound by the holding of the first panel to address an issue of law, unless and until that holding is overruled en banc, or by the Supreme Court.").

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se courts have reasoned that the plain language of
envisions two separate entities, which comports
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." *Yellow Bus Lines*, 883 F.2d at 139 (citing S.
17, 91st Cong., 1st Sess. 76-78 (1969), U.S. Code

Cong. & Admin News 1970, p. 4007). The distinction between the RICO person and the RICO enterprise is necessary because the enterprise itself can be a passive instrument or victim of the racketeering activity. *See Bennett*, 770 F.2d at 315 ("Such a distinction focuses the section on the culpable party and recognizes that the enterprise itself is often a passive instrument or victim of the racketeering activity.").

On appeal, the Goldin Corporations argued that *Hartley* should be reconsidered by the en banc court and reversed. The government asserts that we cannot consider this argument because Goldin's objection to the indictment was raised for the first time on appeal. However, whether a statute prohibits the charged conduct may be considered de novo even if the issue is raised for the first time on appeal. *See United States v. Tomeny*, 144 F.3d 749, 750 (11th Cir. 1998).

After oral argument before a panel of this court, the parties were requested to file briefs solely on the issue of whether *Hartley* was correctly decided. In its supplemental brief, the Government concedes that *Hartley* was wrongly decided. We now agree with our sister circuits that, for the purposes of 18 U.S.C. § 1962(c), the indictment must name a RICO person distinct from the RICO enterprise. The plain language of the statute requires that the entities be distinct. Having decided that *United States v. Hartley* is no longer the law of this Circuit, we remand to the original panel in this case all other matters to be resolved in this appeal.

REMANDED TO THE PANEL.